RECORD AND BRIEFS

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No. 16-980

IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,
Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE,
NORTHEAST OHIO COALITION FOR THE HOMELESS,
AND LARRY HARMON,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Congress May Not Force Ohio To Keep Inactive and Nonresponsive Voters On The Rolls 3

A. The Constitution Gives States The Sovereign Authority To Set And Enforce Voter Qualifications 4

B. Blocking Ohio's Supplemental Process Would Intrude On Its Authority Over Voter Qualifications 7

II. Congress Does Not Have Power To Directly Regulate Who Is Registered To Vote 12

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247 (2013) ..... *passim*

Cook v. Gralike, 531 U.S. 510 (2001) 16

Crowell v. Benson, 285 U.S. 22 (1932) 4

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 4

Foster v. Love, 522 U.S. 67 (1997) 12

Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45 (1959) 7

Luis v. United States, 136 S. Ct. 1083 (2016) 6

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 5

Smiley v. Holm, 285 U.S. 355 (1932) 12, 13

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779. (1995) 16

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const. Article I, § 4, cl. 1 ..... *passim*

U.S. Const. Article II, § 1, cl. 2 4

Ohio Const. Article V, § 1 ..... 7, 11

52 U.S.C. § 20504(a) 14

52 U.S.C. § 20507(b) 3, 11, 14

Ohio Rev. Code Ann. § 3503.01(A) 7

OTHER AUTHORITIES

137 Cong. Rec. S5015
(daily ed. Apr. 24, 1991) 17

138 Cong. Rec. 17,965 (1992) 16

The Federalist No. 60
(Alexander Hamilton)
(Clinton Rossiter ed., 1961) 5

Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (rev. ed. 2009) 15

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 5

S. Rep. No. 103-6 (1993) 8

U.S. Census Bureau, State-to-State Migration Flows (2010) 10

U.S. Census Bureau, State-to-State Migration Flows (2011) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

U.S. Census Bureau, Summary Population and Housing Characteristics: Ohio (2010) 9

U.S. Postal Service, Office of Inspector Gen., MS-MA-15-006, Strategies for Reducing Undeliverable as Addressed Mail (2015) 9

STATEMENT OF INTEREST

The Buckeye Institute was founded in 1989 as an independent research and educational institution to formulate and promote solutions for Ohio's most pressing public-policy problems. The staff at the Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, including electoral reform; compiling and synthesizing data; formulating policies; and marketing those public-policy solutions for implementation in Ohio and replication across the country.[1]

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[1] All parties have granted blanket consent to the filing of amicus briefs in this case. No counsel for any party authored this brief in whole or in part, and no person other than the amicus curiae, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The canon of constitutional avoidance requires the NVRA to be interpreted to allow Ohio to remove inactive and non-responsive voters from its registration rolls. As this Court recently explained, the Constitution respects the sovereign power of the states to set and enforce their own voter qualifications, and thus "it would raise serious constitutional doubts if a federal statute precluded a State from [doing what is] necessary to enforce its voter qualifications." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2258–59 (2013). That is exactly what would happen if the NVRA were interpreted in accord with the decision below.

As all parties recognize, it is a core voter qualification in Ohio for a person to be a resident of the state, county, and precinct where he or she intends to vote. In order to enforce that qualification, the state needs a reliable method to identify and remove registrants who have changed their residency status. A key part of that enforcement effort is the state's practice of sending confirmation notices to inactive voters—who have traditionally been regarded as posing a high risk of changed residency—and then removing them from the voter rolls if they both fail to respond to the notice and continue to remain inactive. If the NVRA were interpreted to prohibit this practice, it would violate the Constitution by severely impeding the state's power to enforce its voter qualifications.

This intrusion on the state's sovereign power over voter qualifications cannot be justified as an exercise of Congress's power under the Elections Clause to

regulate the "Times, Places and Manner of holding Elections." Article I, § 4, cl. 1. At most, this clause authorizes Congress to make procedural regulations governing the time, place, and manner of voting or registering to vote. It does not authorize Congress to dictate the states' substantive rules for determining *who* should be removed from the registration rolls in order to enforce the state's voter qualifications.

ARGUMENT

I. Congress May Not Force Ohio To Keep Inactive and Nonresponsive Voters On The Rolls

As Ohio has explained in its brief, the most straightforward reading of the NVRA does not prohibit the state from applying its longstanding "Supplemental Process" to maintain the integrity of its voter rolls. By its terms, the NVRA prohibits states from deregistering voters "by reason of [their] failure to vote." 52 U.S.C. § 20507(b)(2). Ohio's process respects that rule by sending confirmation notices to inactive voters and then removing them from the rolls *only if they fail to respond to the notice*. Accordingly, any deregistration that occurs is plainly "by reason of" the voter's failure to respond to the notice, not his or her "failure to vote." *Id.*

Even if the statute could be read to support a contrary conclusion, the canon of constitutional avoidance would forbid it. As this Court has explained many times, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of

Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Crowell v. Benson*, 285 U.S. 22, 62 (1932). Here, that canon squarely applies because construing the NVRA to prohibit Ohio from removing inactive and nonresponsive voters from its rolls would intrude on the state's sovereign authority to set and enforce its own voter qualifications.

A. The Constitution Gives States The Sovereign Authority To Set And Enforce Voter Qualifications

As this Court recently explained, the "constitutional power to determine voting qualifications"—i.e., the criteria for who is eligible to vote—lies exclusively with the states. *Inter Tribal Counci.*, 133 S. Ct. at 2259. The Constitution expressly ties voter qualifications for federal elections to the qualifications set by states in their own state legislative elections. Thus, under Article I, § 2, the electors in each state for members of the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The Seventeenth Amendment establishes the same rule for the election of senators. And for presidential elections, "[e]ach State shall appoint [electors], in such Manner as the Legislature thereof may direct." Article II, § 1, cl. 2.

Accordingly, states have the sovereign authority to determine voter qualifications for federal elections, so long as they mimic the qualifications for state legislative elections and, of course, do not violate the Constitution's specific prohibitions on voter qualifications: No person can be denied the vote

based on race, color, or previous condition of servitude (the Fifteenth Amendment); sex (the Nineteenth); a poll tax (the Twenty-Fourth); or an age limit above 18 (the Twenty-Sixth). But otherwise, the power over voter qualifications rests exclusively with the states.

By contrast, the federal legislature has no power over voter qualifications, but only the limited power to "make or alter" regulations governing "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." Article I, § 4, cl. 1. This Elections Clause provision "empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Inter Tribal Council*, 133 S. Ct. at 2257. Accordingly, "[p]rescribing voting qualifications . . . 'forms no part of the power to be conferred upon the national government' by the Elections Clause, which is 'expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections.'" *Id.* at 2258 (quoting *The Federalist* No. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

Moreover, "[s]ince the power to establish voting requirements is of little value without the power to enforce those requirements, . . . it would raise serious constitutional doubts if a federal statute precluded a State from [doing what is] necessary to enforce its voter qualifications." *Inter Tribal Council*, 133 S. Ct. at 2258–59. This principle follows from the venerable canon that the "[a]uthorization of an act also authorizes a necessary predicate act." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 192 (2012). As Chief Justice Marshall observed in *McCulloch v. Maryland*, "[t]he government which has a right to do an act, and has

imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means." 17 U.S. (4 Wheat.) 316, 409–10 (1819). *See also Luis v. United States*, 136 S. Ct. 1083, 1097–98 (2016) (Thomas, J., concurring in the judgment) (further explaining the "Predicate-Act Canon"). Accordingly, the Constitution's clear authorization of state governments to set voter qualifications necessarily entails the power to enforce them.

The importance of the states' enforcement power is well illustrated by this Court's recent decision in *Inter Tribal Council*. In that case, Arizona made U.S. citizenship one of its voter qualifications. Accordingly, in order to "avoid serious constitutional doubt," this Court held that the NVRA had to be interpreted to provide Arizona with an effective "means of enforcing" its citizenship qualification. 133 S. Ct. at 2259. In particular, the NVRA had to be read to allow the state to obtain evidence of applicants' citizenship through the federal registration form mandated by the NVRA. Under the avoidance canon, this interpretation was required as long as it was "at least a possible" reading of the NVRA, even if it was "plainly not the best reading." *Id.* Moreover, if the federal agency responsible for administering the NVRA subsequently refused to allow the state to use the federal form to obtain "information the State deems necessary to determine" citizenship, then the state could "assert a constitutional right to demand concrete evidence of citizenship" "apart from" the federal scheme. *Id.* at 2259-60 & n.10.

B. Blocking Ohio's Supplemental Process Would Intrude On Its Authority Over Voter Qualifications

Because Ohio has exclusive authority to set and enforce its voter qualifications, federal law may not prohibit the state from enforcing its residency qualification through the "Supplemental Process" established by state law. Under that longstanding and bipartisan process, the state sends confirmation notices to voters who have been inactive for over two years, and then removes them from the rolls if they both fail to respond to the notice and fail to engage in voter activity for four more years. Interpreting the NVRA to prohibit Ohio from following this longstanding process would unconstitutionally impede the state's ability to enforce its residency requirement, which is one of its core voter qualifications.

1. Like most states, Ohio requires that an elector be both "a resident of the state thirty days immediately preceding the election" and "a resident of the county and precinct in which the citizen offers to vote." Ohio Rev. Code Ann. § 3503.01(A); *see also* Ohio Const. art. V, § 1 (elector must be "a resident of the state, county, township, or ward, such time as may be provided by law"). It has long been recognized that this type of "[r]esidence requirement[]" is one of the most "obvious examples" of a voter "qualification[]." *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 51 (1959).

In order for Ohio to meaningfully enforce its residency qualification, it must periodically reassess the residency of its registered voters. Particularly

because any registered voter can vote by mail in Ohio, there is often no way to verify a voter's residency in person. Accordingly, it is essential for the state to have a reliable means of verifying residency remotely.

The state's practice of sending confirmation notices to inactive voters is a crucial mechanism for confirming their residency. It would be practically infeasible and quite counter-productive for the state to send confirmation notices to *every* registered voter in the state, which would needlessly impose an enormous logistical burden. This would not only require the annual processing of millions of extra notices by the state, but would also require millions of voters to fill out unnecessary paperwork, resulting in a significantly higher number of "false positive" de-registrations compared to the status quo.

By contrast, Ohio's current "Supplemental Process" of sending confirmation notices only to inactive voters is neatly tailored to address a discrete portion of voters who have traditionally been regarded as posing an especially serious risk of having changed their residency, and thus being improperly registered to vote. *See, e.g.*, S. Rep. No. 103-6, at 46 (1993) (observing that, at the time the NVRA was passed, 35 states either required or permitted officials to remove voters if they had not voted over a certain period of time).

If the NVRA is construed to prohibit Ohio's practice of sending confirmation notices to verify the residency of inactive voters, then the state's ability to enforce its residency requirement will be severely impaired. For example, it would be quite ineffective

for the state to rely on the confirmation process that the plaintiffs have proposed here. *See* Brief in Opposition at 23. Under that process, the state would send an initial round of mailings to *all* registered voters, and would then send confirmation notices only to the addresses of mailings that "bounced back." This method is highly unreliable because in many cases, new residents who receive mail addressed to a prior occupant will simply discard it instead of taking the trouble to "return to sender."

The only plausible alternative is for the state to rely on the National Change of Address database (the "NCOA Process"). But because the database only captures those who file change-of-address forms with the U.S. Postal Service, the NCOA Process is woefully inadequate. According to the USPS Inspector General, "[a]s many as 40 percent of people who move do not inform the Postal Service."[2] This forty percent represents a massive number of potentially inaccurate voter registrations accumulating year over year. In 2010, Ohio had a total population of 11.54 million people, of whom 11.23 million people lived in 4.6 million households, with an average household size of 2.44 people.[3] In the same year, 1.64 million Ohioans aged one year and over moved, which indicates that roughly 655,000 households moved that year (assuming that the

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[2] U.S. Postal Service, Office of Inspector Gen., MS-MA-15-006, Strategies for Reducing Undeliverable as Addressed Mail 15 (2015), *available at* https://www.uspsoig.gov/sites/default/files/document-library-files/2015/ms-ma-15-006.pdf.

[3] U.S. Census Bureau, Summary Population and Housing Characteristics: Ohio 2, 302, 362 (2010), *available at* https://www.census.gov/prod/cen2010/cph-1-37.pdf.

moving population is a normal sample of Ohio's overall population).[4] Accordingly, based on the Postal Service's forty-percent figure, roughly 262,000 Ohio households moved without submitting change-of address-forms in 2010 alone. For these hundreds of thousands of individuals each year, Ohio is completely unable to enforce its residency requirement through the NCOA Process. This is a significant blind spot, particularly considering that the 2012 presidential election in Ohio was decided by a margin of only 166,272 votes.

Given the deficiencies of the NCOA Process, Ohio's existing Supplemental Process is a critical tool for enforcing the state's residency requirement. Unlike in *Inter Tribal Council*, forcing Ohio here to abandon its Supplemental Process would leave the state without any effective "alternative means of enforcing" its "voting qualifications." 133 S. Ct. at 2259. Consequently, Ohio has a "constitutional right to demand" the ability to employ the Supplemental Process to enforce its residency qualification. *Id.* at 2260 & n.10. At the very least, reading the NVRA to so impede the state's ability to enforce its residency requirement would raise "serious constitutional doubt," which is enough to trigger the canon of constitutional avoidance. *Id.* at 2259. Accordingly, as long as it is "fairly possible" to read the NVRA to

[4] U.S. Census Bureau, State-to-State Migration Flows (2010), *available at* https://www2.census.gov/programs-surveys/demo/tables/geographic-mobility/2010/state-to-state-migration/state_to_state_migrations_table_2010.xls; U.S. Census Bureau, State-to-State Migration Flows (2011), *available at* https://www2.census.gov/programs-surveys/demo/tables/geographic-mobility/2011/state-to-state-migration/state_to_state_migrations_table_2011.xls.

allow the enforcement of Ohio's Supplemental Process, the NVRA *must be* so read. *Id.*

2. The constitutional concern here is particularly acute because Ohio's voting qualifications clearly specify that anyone who fails to vote in a four-year period is not qualified to vote without re-registering. Under Article V, § 1, of the Ohio Constitution, entitled "Who may vote," "[a]ny elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote." This rule is plainly a voter qualification because it directly regulates "*who* may vote" in federal elections, not "*how* [such] elections are held." *Inter Tribal Council*, 133 S. Ct. at 2257. Requiring voters to vote at least once every four years or re-register in order to remain qualified is no different in principle from requiring voters to be residents of the state for at least 30 days before voting, which is universally recognized as a voter qualification in practically every state. Accordingly, insofar as the NVRA prohibits states from disqualifying voters "by reason of [their] failure to vote," 52 U.S.C. § 20507(b)(2), it is unconstitutional because it infringes on Ohio's exclusive power to "[p]rescrib[e] voting qualifications," which "forms no part of the power" that is "conferred upon the national government," *Inter Tribal Council*, 133 S. Ct. at 2258.

As noted above, Ohio does not currently enforce the voter-activity qualification contained in its state constitution due to the federal mandate imposed by the NVRA. Instead, the state follows its "Supplemental Process," which removes voters from the rolls only if they are *both* inactive *and* fail to

respond to confirmation notices. Thus, the only question before the Court in the present case is whether to construe the NVRA to impose an even *greater* intrusion on state sovereignty than the state itself is willing to tolerate.

II. Congress Does Not Have Power To Directly Regulate Who Is Registered To Vote

Trenching on Ohio's power over voter qualifications cannot be justified as an exercise of Congress's power to regulate the "Times, Places and Manner of holding Elections." Article I, § 4, cl. 1. As the text makes clear, the "holding" of an "Election[]" is a discrete process that occurs at a series of particular "Times" and "Places." The "Manner of holding" the election thus involves the "mechanics" of how the voting process is conducted at the "Times" and "Places" where the election is held. *Foster v. Love*, 522 U.S. 67, 69 (1997).

Accordingly, while the federal power to regulate the time, place, and manner of holding elections is broad, it is not unlimited. It encompasses an array of procedural issues relating to *how* voting will be done, including where polling places will be located, what times they will be open, and how ballots will be cast—e.g., by machine or paper ballot, in secret or in public, in person or by mail. It also includes the "supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). But however broad this power may be to regulate the process of "*how*" voting should occur, it does not include the authority

to make substantive rules regarding "*who* may vote." *Inter Tribal Council*, 133 S. Ct. at 2257.

In the present case, Ohio's policy of disqualifying those who fail to respond to confirmation notices is a substantive rule regarding *who* is eligible to vote, and not a procedural rule regarding the time, place, or manner of *how* eligible voters cast their ballots. Indeed, clearing the rolls of non-responsive voters is an entirely separate process that occurs quite apart from the casting and counting of ballots, and thus has no conceivable effect on the "Manner" in which the actual election is held. Since Ohio's careful policy of selective deregistration is geared entirely toward determining "*who* may vote" in the state's federal elections, and not "*how* [such] elections are held," it falls completely outside the scope of Congress's power to regulate the "Manner of holding" elections. *Id.*

To be sure, this Court has assumed that Congress's power under the Elections Clause includes some "regulations relating to 'registration.'" *Inter Tribal Council*, 133 S. Ct. at 2253 (quoting *Smiley*, 285 U.S. at 366 (1932)); *but see id.* at 2268 (Thomas, J., dissenting) (noting that this assumption emerged in unconsidered "dicta," and has never been the subject of any "further analysis"). But even granting the assumption that Congress has *some* power to make "regulations relating to registration," those regulations can concern only the time, place, or manner of registering (or voting), as opposed to demarcating who may vote.

1. To be consistent with the text of the Elections Clause, any federal regulation of voter registration must be tied to the "Time[]," "Place[]," or "Manner" of "holding" the actual "Election." Article I, § 4, cl. 1.

This would include, for example, the basic requirement that voters pre-register, as a way of streamlining the "Manner" in which voters will be processed during the actual "holding" of the "Election[]" on election day. It would also include the requirement that voters register for a particular precinct, as a way of specifying the "Places" where they must go to cast their ballots when the election is held. This is not a freestanding power to regulate the voter-registration process, but rather a power to regulate registration only insofar as it affects the time, place, or manner of how the actual election is held.

2. Even if the "holding" of "Elections" could be construed broadly to include voter registration, then Congress's power would extend only to regulating "[t]he Times, Places and Manner of [voter registration]." Article I, § 4, cl. 1. Under this expansive interpretation, Congress could impose procedural rules dictating when, where, and how people may register. Thus, for example, the NVRA could command that voter registration be made available at the DMV (52 U.S.C. § 20504(a)(1)), or up to 30 days before an election (*id.* § 20507(a)), or through the use of a particular "Federal Form" (*Inter Tribal Council*, 133 S. Ct. at 2251). All of this would be allowed because it would involve the process of *how* people must register.

But even under this broad reading, Congress still would not have the power to dictate states' substantive rules for deregistering voters in order to enforce voting qualifications such as residency. That type of state rule has nothing to do with the *process* of registering to vote—i.e., when, where, or how

people register. Instead, it governs who should be excluded from the rolls due to the state's determination that certain people may not be *qualified* to vote. If a voter has not voted for several years and has failed to respond to confirmation notices, a presumption arises that he or she no longer meets the state's residency qualification. Requiring the deregistration of such voters has nothing to do with the time, place, or manner of registering to vote. Instead, it is a substantive rule for enforcing the state's voter qualifications regarding *who* may vote.

To be sure, legitimate regulations of the time, place, or manner of registering may have an incidental effect on who can vote, just like similar regulations of the time, place, or manner of voting: If people do not follow the proper registration procedures, then they obviously will not be able to vote, just as they cannot vote if they fail to follow the proper *voting* procedures, i.e., showing up at one's assigned precinct while the polls are open. But this does not change the fact that there is a clear analytical distinction between genuine time-place-and-manner rules that govern the *procedure* of registration (or voting), as opposed to *substantive* rules that directly govern who is registered to vote.

3. There is no direct evidence of what the Framers thought about voter registration because the practice did not exist at the time of the Founding. *See* Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 122 (rev. ed. 2009) (explaining that Massachusetts implemented the first voter-registration system in 1801). But at the very least, it is clear that "the Framers understood the Elections Clause as a grant

of authority to issue *procedural* regulations, and not as a source of power to . . . evade important constitutional restraints" regarding matters of substance. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995) (emphasis added); *see also Cook v. Gralike*, 531 U.S. 510, 523 (2001) (The Election Clause empowers Congress "to prescribe the *procedural mechanisms* for holding congressional elections." (emphasis added)). That crucial distinction between substance and procedure should be understood in light of this Court's recognition that "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Inter Tribal Council*, 133 S. Ct. at 2257. Accordingly, Congress's procedural power to regulate how people vote cannot be allowed to intrude on the states' substantive rules regarding who can vote. That is exactly what would occur if Congress could dictate its own rules to Ohio for determining how to enforce its residency qualifications through deregistration.

* * *

The limitations described above are wholly consistent with the traditional understanding of the division between state and federal power over federal elections. Before President Clinton signed the NVRA into law in 1993, President Bush vetoed it in 1992, explaining that it "would impose unnecessary, burdensome, expensive, and constitutionally questionable Federal regulation on the States in an area of traditional State authority." 138 Cong. Rec. 17,965–66 (1992). He relied in part on the Justice Department's analysis of the NVRA, which explained that it exceeded Congress's power under the

Elections Clause because "Congress does not have plenary authority" over "elections for federal officials." 137 Cong. Rec. S5015–18 (daily ed. Apr. 24, 1991) (Department of Justice Analysis of National Voter Registration Act).

As this analysis recognizes, Congress does not have a "plenary" power over federal elections, but instead has only the limited power to enact *time-place-and-manner* regulations. In the present case, applying the NVRA to interfere with Ohio's maintenance of its voter rolls would go well beyond regulating the time, place, and manner of "holding Elections." It would even go beyond regulating the time, place, and manner of *voter registration*. Instead, it would intrude directly on the state's substantive rules regarding who is eligible to vote. Upholding the decision below would thus be clearly erroneous not only as a matter of statutory interpretation, but also as a matter of constitutional law.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Sixth Circuit in the decision below.

Respectfully submitted,

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